

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

TIMELINES, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 11 CV 6867
)	
FACEBOOK, INC.)	Jury Trial Demanded
)	
Defendant.)	

**DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF TIMELINES, INC.'S
MOTION FOR RELIEF FROM THE PROTECTIVE ORDER**

I. INTRODUCTION

In its motion seeking relief from the protective order (the “Motion”), Plaintiff Timelines, Inc. (“Plaintiff”) requests an order permitting Mr. Brian Hand, Plaintiff’s Chairman, Co-Founder, and sole employee, to review some of the most highly confidential financial information disclosed by Defendant Facebook, Inc. (“Facebook”) in this action – *i.e.*, (a) internal financial spreadsheets containing granular data associated with Facebook’s revenue (Bates Nos. FB_TL_0011912 and 11919¹), and (b) expert reports and exhibits assessing the same.

With the parties’ stipulation, the Court entered a protective order (the “Protective Order”) on April 24, 2012, to shield a producing party in this action from the disclosure of such highly confidential, commercially sensitive information to employees of the other party. In the Motion, Plaintiff has not articulated a legitimate reason why the Court should now reverse course and permit Mr. Hand to review such information.

Further, Plaintiff failed to mention in the Motion the fact that Facebook previously agreed to disclose to Mr. Hand almost the entirety of the expert reports and the exhibits at issue, provided that Mr. Hand execute a non-disclosure agreement (“NDA”). Plaintiff rejected Facebook’s attempt to reach a compromise regarding this issue, instead choosing to burden this Court and Facebook with another discovery dispute that could have been resolved without judicial intervention. As discussed below, Facebook is still willing to allow Mr. Hand to review portions of the expert reports and the exhibits thereto if he executes an NDA.

II. BACKGROUND

In or about November 2012, Plaintiff’s counsel first requested that Facebook waive the

¹ Plaintiff requests the disclosure of “FB-TL 0011912 - 11919” to Mr. Hand in the Motion. In subsequent correspondence with Plaintiff’s counsel, however, counsel has clarified that Plaintiff seeks the disclosure of FB_TL_00011912 *and* 11919 -- *i.e.*, the two financial spreadsheets produced by Facebook, not all of the documents within the identified Bates range.

“Highly Confidential-Outside Counsel Only” designation of the opening damages expert reports of both Plaintiff’s expert, Mr. David A. Haas, and Facebook’s expert, Mr. Christopher J. Bokhart, in order to allow Mr. Hand to review the reports in full. After counsel met and conferred regarding this issue, Facebook agreed that if Mr. Hand executed an NDA, Facebook would consent to the disclosure of the bodies of the expert reports as well as most of the exhibits to the reports. (*See* correspondence attached as Exhibit A.) Under Facebook’s proposal, Mr. Hand would not be able to review the most granular, highly confidential information that formed the basis for the damages expert reports; however, he would be able to review the entirety of the experts’ analyses and conclusions as well as detailed charts and graphs pertaining to the same.

The purposes of the proposed draft NDA were twofold: (1) to comply with the provisions of the Protective Order requiring the parties to enter into a written agreement before disclosing highly confidential information to individuals like Mr. Hand, *i.e.*, those outside the scope of the Protective Order; and (2) to provide Facebook with an added measure of protection for the highly sensitive financial information to be disclosed to Mr. Hand. (*See* copy of proposed NDA attached as Exhibit B.) The NDA essentially only required Mr. Hand to maintain the confidentiality of the disclosed financial information.

On December 14, 2012, Plaintiff’s counsel sent an email to Facebook’s counsel refusing to disclose portions of the experts reports and exhibits to Mr. Hand in a “piecemeal” manner, and claimed that he would prepare a motion seeking an exception from the Protective Order for Mr. Hand. (Ex. A.) Plaintiff’s counsel stated that Facebook’s counsel could “take a look at the motion and then let me know if [F]acebook objects.” (*Id.*) Plaintiff’s counsel never shared his draft motion with Facebook’s counsel. In fact, until the filing of the present Motion, Facebook’s counsel had not heard from Plaintiff’s counsel about this matter since his December 14 email.

III. ARGUMENT

Pursuant to Paragraph 5 of the Protective Order, a party may designate as “Highly Confidential-Outside Counsel Only” any document or piece of information that “it reasonably and in good faith believes is of such a . . . commercially or competitively sensitive nature that disclosure to persons other than those [specified in the Order] could reasonably be expected to result in injury to that Party.” (Docket No. 55 ¶ 5.) The Protective Order specifically identifies “financial data, reports or analysis” as one category of confidential information that may be designated as “Highly Confidential-Outside Counsel Only.”

Facebook produced the financial spreadsheets at issue (Bates Nos. FB_TL_0011912 and 11919) in response to Plaintiff’s discovery requests. At the time of production, Facebook designated the spreadsheets as “Highly Confidential-Outside Counsel Only” because the spreadsheets contain commercially and competitively sensitive information associated with Facebook’s revenue. Specifically, the spreadsheets together disclose Facebook’s revenue figures relating to advertising impressions on the profile and timeline pages of Facebook’s website on a monthly basis from September 2010 to September 2012 – which constitutes a period of time both before and after Facebook became a publicly traded company. In addition, one of the spreadsheets provides granular revenue, impression, and click data associated with advertising relating to Facebook’s “profile” and “timeline” pages, broken down by various Facebook advertisement products. This information is highly competitively sensitive and the “Highly Confidential-Outside Counsel Only” designation for the information remains reasonable and appropriate.

Both damages experts executed the undertaking attached to the Protective Order before reviewing any confidential documents in this action. In assessing Plaintiff’s damages or lack

thereof, both experts relied heavily on Facebook's "Highly Confidential-Outside Counsel Only"-designated financial spreadsheets. Thus, the experts designated their reports as "Highly Confidential – Outside Counsel Only" at the time of disclosure.

In its Motion, Plaintiff does not challenge the commercially sensitive nature of the financial documents at issue and the related expert reports and exhibits. Instead, Plaintiff speculates that the documents may not warrant protection under the Protective Order because the data contained in the documents "may already be public, or may soon become public." (Pl.'s Mem. in Supp. Mot., p. 3, Dkt. No. 78.) As Timelines is well aware, however, the documents produced contain unaudited financials (Dep. Tr. of Mr. Samuel Lessin 198:9-11), and Facebook's public disclosures are not made at anything approaching the level of detail contained in these confidential documents. (*See* excerpts from Form 10-k, filed February 1, 2013, attached as Exhibit C; also available online at <http://investor.fb.com/results.cfm>). Accordingly, Facebook appropriately designated the spreadsheets as "Highly Confidential-Outside Counsel Only" at the time of production and that designation remains appropriate; likewise, Mr. Haas and Mr. Bokhart appropriately designated their expert reports at the time of disclosure.

Plaintiff contends that Mr. Hand needs to review Facebook's financial spreadsheets and the related expert reports "because his knowledge of the same is critical to his ability to continue overseeing this case and participating in the trial." (Pl.'s Mem. in Supp. Mot., p. 3, Dkt. No. 78.) Yet the monthly total revenue figures and granular data relating to advertising revenue, impressions, and clicks have no bearing on whether Mr. Hand is able to manage this litigation or participate in the trial. Mr. Hand can assess the merits of the claims and defenses in this matter without such information. Further, to the extent either party finds it necessary to rely on such granular data at trial, the parties can address the treatment of such information in their pretrial

motions and during the pretrial conference. It is premature for the parties and the Court to address that issue now while Facebook's summary judgment motion is pending.

Furthermore, through its counsel, Facebook has already notified Plaintiff that Facebook will consent to the disclosure of portions of the expert reports and the exhibits thereto, provided that Mr. Hand executes an NDA. Plaintiff's unwillingness to have Mr. Hand execute an NDA to date is at odds with Plaintiff's cursory contention in its Motion that "Mr. Hand would of course keep the information confidential." (Pl.'s Mem. in Supp. Mot., p. 4, Dkt No. 78.)

In a further effort to resolve this discovery dispute, Facebook proposes that if Mr. Hand executes Facebook's proposed NDA, Facebook will agree to the disclosure of the bodies of the expert reports of Mr. Haas (both opening and rebuttal) and Mr. Bokhart, as well as the exhibits thereto, with the exception of: (a) Exhibits 3.1 and 3.2 and Amended Exhibits 3.1 and 3.2 of Mr. Haas's expert report and (b) Exhibit 4 of Mr. Bokhart's expert report. Facebook's financial spreadsheets are reproduced or otherwise incorporated in Exhibits 3.1 and 3.2 and Amended Exhibits 3.1 and 3.2 of Mr. Haas's report, as well as Exhibit 4 of Mr. Bokhart's report. Facebook should not have to disclose such highly confidential material to Mr. Hand under the Protective Order.

IV. CONCLUSION.

For the reasons stated above, Facebook respectfully requests that the Court deny Plaintiff's Motion.

Dated: February 5, 2013

Respectfully submitted,

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*Counsel for Defendant-Counterplaintiff
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served the foregoing **DEFENDANT FACEBOOK, INC.'S OPPOSITION TO PLAINTIFF TIMELINES, INC.'S MOTION FOR RELIEF FROM THE PROTECTIVE ORDER** by means of the Court's CM/ECF System, which causes a true and correct copy of the same to be served electronically on all CM/ECF registered counsel of record, on February 5, 2013.

Dated: February 5, 2013

/s/ Brendan J. Hughes

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